No. 88-383

Supreme Court, U.S.
FILED
AUG 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

BERNARD J. DILLON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEPHEN P. GALLAGHER
MICHAEL J. STACK, JR.
STACK & GALLAGHER, P.C.
Attorneys for Petitioner
1600 Locust Street
Philadelphia, Pennsylvania 19103
(215) 735-6500

7716
Lutz Appellate Printers, inc. • NJ (201) 257-6850 • NY (212) 840-4640 • PA (215) 925-6500 MA (617) 542-1114 • DC (202) 783-7288 • USA (800) 5 APPEAL

QUESTIONS PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Third Circuit was in conflict with an applicable decision of the United States Supreme Court where the Court failed to follow the pronouncements of the United States Supreme Court when it allowed statements obtained from a federal employee after he was threatened with economic sanctions unless he cooperated to be introduced at his trial and where the statements obtained were infected by the coercion inherent in that scheme of questioning and were not voluntary.

OTHER PARTIES IN THE CASE

None.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Other Parties in Case	ii
Table of Contents	iii
Table of Citations	iii
Opinions Below	2
Jurisdiction	2
Constitutional Provision Involved	3
Statement of the Case	3
Reasons for Granting the Writ	4
Conclusion	8

TABLE OF CITATIONS

Cases Cited:

Gardner v. Broderick, 392 U.S. 273, 20 L.Ed. 2d 1082, 88 S. Ct. 1913 (1968) 5

Garrity v. New Jersey, 385 U.S. 493, 17 L. Ed. 2d 562 87 S. Ct. 616 (1967) 4, 5, 6, 7

Contents

Page

Garrity v. United States, 385 U.S. 493, 17 L. Ed. 2d 562, 87 S. Ct. 616 (1967) 7

Lefkowitz v. Cunningham, 431 U.S. 801, 53 L. Ed. 2d 1, 97 S. Ct. 2132 (1977) 5

Lefkowitz v. Turley, 414 U.S. at 79-84, 38 L. Ed. 2d 274, 94 S. Ct. 316 5

Lisenda v. California, 314 U.S. 219, 86 L. Ed. 166, 62 S. Ct. 280 7

Minnesota v. Murphy, 465 U.S. 420, 79 L. Ed. 2d 409, 104 S. Ct. 1136 4

Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 ALR3d 974 6

Sanitation Men v. Commissioner of Sanitation, 392 U.S. 280, 20 L.Ed. 2d 1089, 88 S. Ct. 1917 (1968) 5

Statutes Cited:

18 U.S.C. § 201(c) (1982) 2

28 U.S.C. § 1254(1) 2

United States Constitution Cited:

United States Constitution, Amendment V 3, 5

Contents

Page

APPENDIX

Appendix A—Opinion Dated June 2, 1988, by the United States Court of Appeals for the Third Circuit 1a

Appendix B—Order Dated July 1, 1988 Denying the Petition for Rehearing 6a

Appendix C—Order of the District Court for the Eastern District of Pennsylvania (Suppression Hearing) 8a

No.

In The

Supreme Court of the United States

October Term, 1988

BERNARD J. DILLON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your Petitioner, Bernard J. Dillon, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on July 1, 1988.

OPINIONS BELOW

The Court of Appeals for the Third Circuit entered its opinion affirming the conviction of Petitioner for violation of 18 U.S.C. Section 201(c) (1982), four counts of Receiving and Agreeing to Receive Bribes on June 2, 1988. On July 1, 1988, the Court of Appeals for the Third Circuit entered an Order denying Petition for Rehearing. A copy of the 2 June 1988 Opinion filed by the United States Court of Appeals for the Third Circuit is appended at pages 11 to 15. A copy of 1 July 1988 Order denying the Petition for Rehearing is appended at page 16.

The District Court for the Eastern District of Pennsylvania, after denying Petitioner's Motion to Suppress stated on the record its reasons for such denial and is appended at pages 17 and 18.

The District Court for the Eastern District of Pennsylvania, after trial by jury, denied Motions for New Trial and Judgment of Acquittal and sentenced the Petitioner on September 10, 1987 to a term of imprisonment of four years on each of Counts 1, 2 and 3; said periods of imprisonment to run concurrent each with the other; and on Count 4 imposition of sentence was suspended and the defendant was placed on a period of probation for a period of five years to commence at the expiration of incarceration.

JURISDICTION

The judgment of the Court of Appeals affirming the conviction of the Petitioner was entered on June 2, 1988. A copy of the Opinion of the United States Court of Appeals for the Third Circuit is appended at pages 11 to 15. On July 1, 1988 an Order was entered denying a Petition for Rehearing, appended at page 16. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be compelled in any criminal case to be a witness against himself or be deprived of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

Petitioner, Bernard J. Dillon, was the area director of the Philadelphia Area Office of the Occupational, Safety & Health Administrtion (OSHA), United States Department of Labor. He was accused of accepting One hundred dollars ($100.00) on October 9, 1985, One hundred dollars ($100.00) on October 23, 1985 and Three hundred dollars ($300.00) on September 17, 1985; and agreeing to accept something of value on December 17, 1985 to be influenced in the performance of an official act. In essence, he was charged with accepting sums of money, five hundred dollars ($500.00) total from a local union.

Bernard Dillon was interviewed by agents of the FBI and the Department of Labor on February 14, 1986. At that time, agents obtained incriminating statements from Bernard J. Dillon which were used by the government at his trial. These statements were obtained after Bernard J. Dillon, who had approximately 34 years of government service and has 7 children, was threatened with the loss of his job, pension and retirement benefits if he did not cooperate with the special agents of the Department of Labor by giving a statement. These statements were the subject of the suppression hearing held before the Honorable Joseph L. McGlynn, Jr. At the hearing, both the Petitioner, Bernard J. Dillon, and the special agent of the Department of Labor testified that if Dillon did not cooperate, he would be fired immediately

and the agents would proceed immediately to try to stop him from getting his pension. The Motion to Suppress was denied by the Honorable Joseph L. McGlynn, Jr. Bernard J. Dillon was tried before the Honorable Joseph L. McGlynn, Jr. and a jury. At that time the statements obtained by the agents on February 14, 1986 from Bernard J. Dillon were introduced by the government in their case in chief. The statements were extremely damaging to the Petitioner, Bernard J. Dillon.

The Petitioner, Bernard J. Dillon, was convicted on all counts.

REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States clearly stated that the protection against coerced confessions under the Constitution prohibits the use in subsequent criminal proceedings of confessions obtained from public officers under a threat of removal from office. In *Garrity v. New Jersey,* 385 U.S. 493, 17 L.Ed. 2d 562, 87 S.Ct. 616, a case that factually parallels this case, the United States Supreme Court held:

> "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of the body politic." 17 L.Ed. 2d at p. 567.

The Supreme Court recently reaffirmed this position in the case of *Minnesota v. Murphy,* 465 U.S. 420, 79 L.Ed. 2d 409, 104 S.Ct. 1136, when it quoted with approval the line of cases where the assertion of the privilege against incrimination is penalized so as to "foreclose a free choice to remain silent . . . " The Supreme Court stated at 79 L.Ed. 2d, p. 424:

"In each of the so-called "penalty" cases, the State not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions "capable of forcing the self incrimination which the Amendment forbids." *Lefkowitz v. Cunningham,* 431, U.S. 801, 806, 53 L.Ed. 2d 1, 97 S.Ct. 2132 (1977). In most of the cases, the attempt to override the witnesses' privilege proved unsuccessful, and the court ruled that the State could not constitutionally make good on its prior threat. *Lefkowitz v. Turley,* 414 U.S., at 79-84, 38 L.Ed. 2d 274, 94 S.Ct. 316; *Sanitation Men v. Commissioner of Sanitation,* 392 U.S. 280, 283-284, 20 L.Ed. 2d 1089, 88 S.Ct. 1917 (1968); *Gardner v. Broderick,* 392 U.S. 273, 278-279, 20 L.Ed. 2d 1082, 88 S.Ct. 1913 (1968). These cases make clear that "a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Lefkowitz v. Cunningham,* supra, at 805, 53 L.Ed. 2d 1, 97 S.Ct. 2132. Occasionally, however, an individual succumbed to the pressure placed upon him, failed to assert the privilege, and disclosed incriminating information, which the State later sought to use against him in a criminal prosecution. *Garrity v. New Jersey,* 385 U.S. 493, 17 L.Ed. 2d 562, 87 S.Ct. 616 (1967), was such a case and the Court held that an individual threatened with discharge from employment for exercising the privilege had not waived it by responding to questions rather than standing on his right to remain silent. Id., at 498-499, 17 L.Ed. 2d 562, 87 S.Ct. 616.

The *Garrity* case was a case where police officers were questioned about matters concerning the fixing of traffic tickets. Before being questioned, each officer was warned that anything he said might be used against him in any state criminal proceeding: he had the privilege to refuse to answer if the disclosure would tend to incriminate him; but if he refused to answer, he would be subject to removal from office. The questioning was done in a room in a local firehouse, some of the officers had lawyers present -- there was, according to a stenographer, no indications of unwillingness or even signficant hesitation on the part of any of the officers in answering the questions. *Garrity* (supra) 17 L.Ed. 2d at p. 569. Portions of the statements were admitted at a criminal trial of the officers. The officers themselves testified at the criminal trial and gave evidence essentially consistent with the statements taken from them. *Garrity* (supra) at 17 L.Ed. 2d, p. 570. The Supreme Court, after considering all of the above, stated:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda v. Arizona,* 384 U.S. 436, 464-465, 16 L.Ed. 2d 694, 718, 56 S.Ct. 1602, 10 ALR3d 974, is likely to exert such pressure upon an individual as to disable him from making a free and rational choice." We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions." *Garrity* (supra) at 17 L.Ed. 2d at p. 565, 566.

The choice was clear to Bernard Dillon: either forfeit his job, his pension and retirement benefits or to incriminate himself. This

option to lose his means of livelihood or to pay the penalty of self-incrimination is the antithesis of "free choice to admit, to deny, or to refuse to answer." *Lisenba v. California,* 314 U.S. 219, 241, 86 L.Ed. 166, 182, 62 S.Ct. 280. The statements obtained from Bernard Dillon "were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary . . . " See *Garrity v. New Jersey,* 385, U.S. 493, 498, 17 L.Ed. 2d, 562, 565, 566, 87 S.Ct. 616.

The United States Court of Appeals for the Third Circuit failed to follow the pronouncements of the Supreme Court of the United States in the case of *Garrity v. New Jersey,* the Memorandum Opinion of the panel filed in this case on June 2, 1988 completely ignores the majority opinion of *Garrity v. New Jersey* and in fact, takes the position of the dissent enunciated in *Garrity v. New Jersey.*

Petitioner contends that his case factually parallels in every instance the case of *Garrity v. New Jersey* in that he was threatened with economic sanctions unless he cooperated and that the statements obtained therefrom were infected by the coercion inherent in the scheme of questioning and therefore were not voluntary. The decision of the United States Court of Appeals for the Third Circuit is in conflict with the applicable decisions of this Honorable Court especially *Garrity v. United States,* 385 U.S. 493, 17 L.Ed. 2d 562, 87 Supreme Court 616 (1967), and a Writ of Certiorari should issue to review this decision.

CONCLUSION

For the foregoing reasons, Petitioner, Bernard J. Dillon, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

STEPHEN P. GALLAGHER
Stack & Gallagher, P.C.
1600 Locust Street
Philadelphia, Pa. 19103
(215) 735-6500
Attorney for Appellant,
Bernard J. Dillon

APPENDIX A — OPINION DATED JUNE 2, 1988, BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1575

UNITED STATES OF AMERICA,

vs.

BERNARD J. DILLON,

Appellant.

Appeal from the United States District Court for the Eastern District of Pennsylvania
(Crim. No. 86-00466-01)

District Judge: Honorable Joseph L. McGlynn, Jr.

Submitted Under Third Circuit Rule 12(6)
May 31, 1988

BEFORE: SEITZ, SLOVITER and HUTCHINSON,
Circuit Judges.

(Filed: June 2, 1988)

MEMORANDUM OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Appendix A

Appellant Bernard J. Dillon appeals from the judgment of sentence of the district court. He was convicted by a jury on four counts of receiving and agreeing to receive bribes in violation of 18 U.S.C. § 201(c) (1982). We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

Dillon was the Area Director of the Philadelphia Area Office of the Occupational Safety and Health Administration ("OSHA"), United States Department of Labor ("DOL"). Several conversations between Dillon and Stephen Traitz, Jr., Business Manager of the Roofers Union Locals 30/30B ("Union") and between Union officials were picked up by electronic listening devices.[1] These conversations implicated Dillon in ordering harassing OSHA inspections of non-Union roofing contractors and in promising to help falsify an employment application for an individual seeking a position with OSHA in exchange for cash payments. These conversations were corroborated by OSHA inspection records and other documentary evidence.

Based on this evidence, the Federal Bureau of Investigations ("FBI") sought to interview Dillon. On February 14, 1986, Dillon was contacted at home by an OSHA supervisor and informed that an FBI agent and two DOL Special Agents desired to interview him. Dillon telephoned one of the DOL agents and agreed to meet the agents at his office that afternoon.

At his office prior to meeting these agents, Dillon mentioned

---

1. The listening devices were installed in the Union offices and surveillance was undertaken by the Federal Bureau of Investigations pursuant to authorization of a federal district court judge. Dillon was not a named interceptee in the order authorizing the electronic surveillance.

to two of his colleagues that he was aware of the subject of the interview and that he was preparad to answer any questions asked of him. The interview was conducted by the three agents in Dillon's office in the presence of an OSHA official. Dillon was neither restrained nor placed under arrest.

Prior to his answering any questions, Dillon was informed of the allegations against him and was advised of his constitutional right to remain silent and to have legal counsel present. He was also told that he faced criminal charges, that he could lose his job and pension benefits if he had abused his office, and that his silence could be considered in an administrative proceeding. Dillon acknowledged that he understood his rights and signed a DOL Advice of Rights form that specified his administrative rights, which included the right to remain silent. Dillon proceeded to make a variety of statements regarding his dealings with Union officials.

Prior to trial, Dillon sought to have his statements suppressed. The district court denied his motion. At trial, the statements made by Dillon were introduced into evidence by the government in its case in chief. Dillon contends that this evidence was "extremely damaging" to him. He was convicted on all four counts. Following sentencing, Dillon filed this appeal.

On appeal, Dillon asserts that the district court erred in failing to suppress statements made by him. Dillon contends that his statements were made involuntarily because he was threatened with the loss of his job and pension benefits if he failed to cooperate with the investigation. Our standard of review of whether statements were voluntarily made is plenary. *Davis v. North Carolina,* 384 U.S. 737, 741-42 (1966).

Appendix A

Statements involuntarily made by a defendant to law enforcement agents are inadmissible at trial. *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) ("*any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law") (emphasis in original). We must therefore determine whether the statements made by Dillon to the agents in his office were involuntarily made. In determining whether statements were made voluntarily, "all the circumstances surrounding the giving of the confession" must be considered. 18 U.S.C. § 3501(b) (1982).

Dillon does not contend that he was in custody at the time of his interview. Rather, relying on *Garrity v. New Jersey*, 385 U.S. 493 (1967), and its progeny, he asserts that the threat of loss of his job and pension benefits rendered his statements involuntary.

Based on our review of the record, we find this contention to be meritless. The circumstances surrounding the meeting in no way indicate that Dillon's will was overborne or that he was coerced into making the statements. Dillon was informed by the agents that he had the right to remain silent and to have counsel present. The interview was held in his own office in the presence of an OSHA colleague of Dillon's.

Dillon's reliance of *Garrity* and its progeny is inapposite. Those cases stand for the proposition that the government cannot impose an economic or other sanction on an individual for his invoking his constitutional right not to incriminate himself. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984). In this case, by contrast, Dillon was informed that he would lose his job and pension benefits if he had abused his office. He was specifically informed of his right to remain silent and that he would not lose

his job or pension benefits solely for remaining silent. That his silence could be considered a factor in an administrative proceeding is not violative of Dillon's constitutional right to remain silent, nor, does this possibility, without more, compel the conclusion that his statements were made involuntarily.

In light of the foregoing, we conclude that the district court did not err in refusing to suppress the statements made by Dillon to law enforcement agents at his office on February 14, 1986. Accordingly, the judgment of sentence entered against Dillon will be affirmed.[2]

TO THE CLERK OF THE COURT:

Please file the foregoing memorandum opinion.

s/Collins J. Seitz
Circuit Judge

---

2. Given our resolution of this case, we need not address the government's contention that any alleged error in admitting into evidence Dillon's statements constitutes harmless error in that the evidence establishing Dillon's guilt was overwhelming.

APPENDIX B — ORDER DATED JULY 1, 1988, DENYING THE PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1575

UNITED STATES OF AMERICA,

vs.

BERNARD J. DILLON,

Appellant.

On Appeal From the United States District Court
for the Eastern District of Pennsylvania
(D. C. Crim. No. 86-00466-01)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges.*

The petition for rehearing filed by appellant, Bernard Dillon, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the

Appendix B

petition for rehearing is denied.

By the Court,

s/Seitz
Circuit Judge

DATED: July 1, 1988

APPENDIX C — ORDER OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (SUPPRESSION HEARING)

[39] THE COURT: All right.

I will make the finding that he was not in custodial interrogation.

That he was summoned to his own office on pretext, I guess that the Secretary of Labor had revoked his leave.

Before he had met the agents, he met with Miss Shanahan and told her that when she explained this situation to him, that the agents wanted to speak to him, he said to Miss Shanahan, that he said they can come and they can ask me anything they want. Again, before he spoke to the agents, he spoke to Mr. Stanley, and in his conversations with Mr. Stanley, he told him or suggested that he was available to be interviewed and that he suspected that it was about the Roofer's Union.

When the agents did arrive, the three agents were present; Mr. Tamm, Mr. Kain and Miss Anderson.

Some initial questions were asked by Special Agent Tamm of the FBI and when he replied, made several replies, Miss Anderson thought it best to give him his warnings and give, not only advice of rights as prescribed by the Department of Labor but he was given the Miranda warnings.

I'm convinced that that is the case, not only because of the testimony of the three agents but because my recollection of Mr. Stanley's testimony is that he specifically remembered him being advised of his right to counsel.

Appendix C

In fact that the government would provide counsel [40] free of charge, if he could not afford counsel.

He gave statements; reponded to the questions; his will was not overborne. He was aware of the information which they were -- or the target of their investigations. He answered the questions freely and the statement itself suggests that at least, that for a period of time, he tried to excuse or mitigate his own involvement by indicating whether it was a gift or the monies he received were a gift or a Christmas present or money he received to set up a program on behalf of the Roofer's Union.

My conclusion is that it was not custodial interrogation but even if it were, he received his full Miranda warnings. So even if it were custodial interrogation the statements would still be admissible and I'm also satisfied that his will was not so overborne that it was not the product of his free will, free involvement.

That's my ruling so your motion to suppress will be denied.

MR. SCHEFF: Thank you, Your Honor.

THE COURT: Thank you very much.